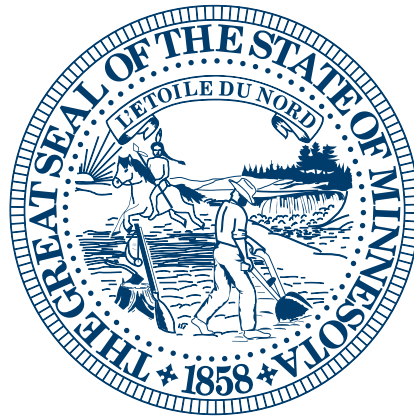


STATE OF MINNESOTA

ATTORNEY GENERAL'S
WORKING GROUP ON
SEXUAL ASSAULT



*Recommendations
December 2018*

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INTRODUCTION

Sexual assault is a violent crime that can result in severe and life-long mental, physical, and economic consequences for victim-survivors. Law enforcement should conduct investigations of sexual assaults in ways that treat victim-survivors with respect and dignity, hold offenders accountable, and protect the public from sexual violence. Yet, recent reports have shown the need for significant improvements in how Minnesota's systems respond to sexual assault reports by adults.

Attorney General Lori Swanson convened this Working Group to recommend ways in which the criminal justice system in Minnesota can improve its response to sexual assault reports by adult victim-survivors. The mission of the Attorney General's Working Group on Sexual Assault was to develop recommendations that will improve law enforcement and prosecutorial responses to sexual assault reports and help transform Minnesota into a national leader in investigating sexual assault crimes. The Working Group was composed of victim advocates, law enforcement investigators, prosecutors, and health professionals with decades of expertise in sexual assault investigations.

The members of the Working Group were:

- Barbara Johnson, Chair
- Teri McLaughlin, Executive Director, Minnesota Coalition Against Sexual Assault
- Dr. Mark Hudson, Midwest Children's Resource Center
- Chief Paul Schnell, Inver Grove Heights Police Department
- Chief Deputy Lisa Lovering, Isanti County Sheriff's Office

- Paul Young, Criminal Division Chief, Anoka County Attorney's Office
- Nicole Matthews, Executive Director, Minnesota Indian Women's Sexual Assault Coalition
- Sgt. Nichole Sipes, St. Paul Police Department
- Dr. Carolyn Porta, University of Minnesota School of Nursing

The Working Group first convened on September 18, 2018 and met regularly throughout the fall. The central challenge for this diverse group of experts and stakeholders was to outline immediate steps that can be taken to improve Minnesota's response to sexual assault reports and to issue recommendations prior to the January 2019 legislative session. The group's focus was on sexual assaults against adults. The recommendations were not designed to address assaults against children and adolescents, which are covered by separate reporting requirements, procedures, and statutes.

Gaps and lapses in the criminal justice system's response to sexual assaults are systemic and complex. Some involve financial constraints on local law enforcement agencies. At the same time, there are many dedicated, talented professionals in the criminal justice system whose daily work helps to support victim-survivors and hold perpetrators accountable. The goal of the Working Group was to identify what's working and fix what isn't. It will take a combined and sustained effort by law enforcement, prosecutors, the health delivery system, victim advocates and rights organizations, the judiciary, the legislature, state and local policymakers, and the public to bring about long-term systemic reforms and enhance Minnesota's national standing in responding to sexual violence crimes. Having said that, the Working Group hopes that its recommendations are a step in the right direction and can have a positive and immediate impact

in improving treatment of victim-survivors, holding perpetrators accountable, and enhancing public safety.

BACKGROUND

This Report uses the term “sexual assault” to refer to felony crimes of sexual violence. Minnesota’s criminal sexual conduct statutes are codified at Minnesota Statutes sections 609.342–.3451, and are discussed more extensively below.

Sexual assault has long-term emotional, physical, and economic consequences for victim-survivors. All individuals, regardless of race, national origin, age, sex, religion, gender, sexual orientation or identity, ability, or socio-economics, can be victims of sexual assault. Sexual assault is one of the most underreported violent crimes.

Research on sexual assault has shown the following:

- Most sexual assault victim-survivors are acquainted with the suspect in some way, although they did not expect sexual contact with the suspect.¹
- Most victim-survivors do not report sexual assault. According to the U.S. Bureau of Justice Statistics, only 23.2% of rapes or sexual assaults in 2016 were reported to police.²

¹ See Claire R. Gravelin *et al.*, *Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors*, FRONTIERS OF PSYCHOLOGY (2018); John A. Humphrey and Jacquelyn W. White, *Women’s Vulnerability to Sexual Assault from Adolescence to Young Adulthood*, JOURNAL OF ADOLESCENT HEALTH (2000), v. 27, pp. 419-424.

²Department of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey, 2010-2016*, Table 4 at p.7 (Revised 2018), available at <https://www.bjs.gov/content/pub/pdf/cv16re.pdf>.

- Victim-survivors who do report sexual assault often delay reporting, sometimes for months or years.³
- Victim-survivors usually do not report to the police first but instead speak first to a close friend or relative, a health care provider, or a victim advocate.⁴
- Victim-survivors' emotional reactions may include shame, fear, extreme sadness, and embarrassment.⁵
- The trauma from sexual assault victimization can increase chances for substance abuse, health disorders, mental health issues, and suicide.⁶
- Alcohol or drugs are involved in a high percentage of sexual assaults.⁷

Contrary to some perceptions, research shows that false reports of sexual assault are extremely rare, accounting only for a very small percentage of all sexual assault reports.⁸ It is important to distinguish between false allegations and unsubstantiated allegations. A false report occurs when evidence from an investigation proves that no crime was committed or attempted.

³ See Stephanie Lanthier *et al.*, *Responded to Delayed Disclosure of Sexual Assault in Health Settings: A Systematic Review*, *Trauma, Violence, and Abuse* 19.3 (2018).

⁴ See Emily R. Dworkin *et al.*, *Disclosing Sexual Assault Within Social Networks: A Mixed-Method Investigation*, *AMERICAN JOURNAL OF COMMUNITY PSYCHOLOGY* 57.1–2 (2016).

⁵ See, e.g., Christopher R. DeCou *et al.*, *Assault-Related Shame Mediates the Association Between Negative Social Reactions to Disclosure of Sexual Assault and Psychological Distress*, *PSYCHOLOGICAL TRAUMA: THEORY, RESEARCH, PRACTICE, AND POLICY* 9.2 (2017).

⁶ See, e.g., Anthony J. Rosellini *et al.*, *Sexual Assault Victimization and Mental Health Treatment, Suicide Attempts, and Career Outcomes Among Women in the US Army*, *AMERICAN JOURNAL OF PUBLIC HEALTH* 107.5 (2017).

⁷ See Katherine Lorenz and Sarah E. Ullman, *Alcohol and Sexual Assault Victimization: Research Findings and Future Directions*, *AGGRESSION AND VIOLENT BEHAVIOR* v. 31 (2016).

⁸ A study in the peer-reviewed journal *Violence Against Women* found that the prevalence of false allegations is between 2% and 10%. See Lisak, D., et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, *VIOLENCE AGAINST WOMEN* (2010), 16, 1318–1334.

An unsubstantiated report occurs when, for multiple possible reasons, the investigation fails to uncover sufficient evidence to prove that a sexual assault occurred.⁹

In Minnesota, 481 offenders were sentenced for criminal sexual conduct in 2016, which was a ten percent decrease from 2015 and represents the fewest number of criminal sexual conduct offenders sentenced since 1983.¹⁰ In 20 percent of the cases sentenced, the victims were adults.¹¹ Ninety-four percent of offenders sentenced for criminal sexual conduct received sentences that included incarceration, either in state prison or local jail.¹² The average pronounced sentence, across all degrees of criminal sexual conduct, was 133 months.¹³

The Minnesota Bureau of Criminal Apprehension (BCA) maintains some data on the number of “rapes” that are reported and cleared by arrest in Minnesota. The BCA defines “rape” for purposes of this data as “penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”¹⁴ BCA data shows that the number of rapes reported to law enforcement each year is high and far outpaces the number of homicides, which tend to be the most resource-intensive

⁹ International Association of Chiefs of Police, *Sexual Assault Response: Policy and Training Content Guidelines* 6–7 (2015), available at <https://www.theiacp.org/sites/default/files/all/i-j/IACP%20Sexual%20Assault%20Response%20Policy%20and%20Training%20Content%20Guidelines.2017.3.23.pdf>.

¹⁰ Minnesota Sentencing Guidelines Commission, *Sentencing Practices: Criminal Sexual Conduct Offenses Sentenced in 2016* (January 2018), available at http://mn.gov/msgc-stat/documents/reports/2016/2016_MSGC_Criminal_Sexual_Conduct_Report.pdf.

¹¹ *Id.* at 7 (adult is defined as eighteen or older).

¹² *Id.* at 1.

¹³ *Id.* at 1.

¹⁴ *Id.* at 15.

investigations conducted by law enforcement agencies. The following chart uses BCA data to compare the number of homicides to rapes reported and cleared in Minnesota in 2017:¹⁵

2017 Murder and Rape Cases in Minnesota

Offense Type	Actual Offenses Reported	Crime Rate	Cleared by Arrest	% Cleared by Arrest
Murder	119	2	88	74%
Rape	2429	44	913	38%

The “actual offenses reported” figure is based on the total number of reported offenses, minus any reports deemed unfounded after investigation.¹⁶ “Crime rate” refers to the number of crimes reported per 100,000 in the population.¹⁷ Notably, this data does not include actual offenses that do not fall under the definition of rape but would still fall under Minnesota’s criminal sexual contact statutes.

Incidents of sexual assault are especially high for some groups. According to U.S. Justice Department data, people with disabilities are sexually assaulted at a rate more than three times higher than those without disabilities.¹⁸ Offenders often target people with intellectual disabilities because they believe they may be more easily manipulated and have difficulty

¹⁵ Minnesota Department of Public Safety, Bureau of Criminal Apprehension, *2017 Uniform Crime Report*, Table 4.4. at 51, available at <https://dps.mn.gov/divisions/bca/bca-divisions/mnjis/Documents/2017-Minnesota-Uniform-Crime-Report.pdf>.

¹⁶ *Id.* at 51 (Table 4.4.).

¹⁷ *Id.* at 13.

¹⁸ U.S. Department of Justice, Bureau of Justice Statistics, *Crime Against Persons with Disabilities, 2009-2015* (2017), available at <https://www.bjs.gov/content/pub/pdf/capd0915st.pdf>.

testifying later.¹⁹ According to data from the U.S. Bureau of Justice Statistics, Native Americans are more than twice as likely to experience sexual assault compared to all races.²⁰ According to the Centers for Disease Control, rates of sexual assault are also significantly higher for gay and bisexual individuals.²¹ Approximately 1 in 8 lesbian women, and nearly half of bisexual women, have been raped, compared to 1 in 6 heterosexual women. Approximately 4 in 10 gay men, and nearly half of bisexual men, have experienced sexual violence other than rape, compared to 1 in 5 heterosexual men. A survey by the National Center for Transgender Equality found that nearly half of respondents had been sexually assaulted at some point in their lives.²² With respect to victim-survivor age, females aged 18 to 24 have the highest rate of sexual assault compared to females in all other age groups.²³ If a sex offender is not apprehended and convicted upon an initial report of assault, he may be free to reoffend again and again, jeopardizing public safety and resulting in needless shattering of additional lives.

¹⁹ See Joseph Shapiro, *The Sexual Assault Epidemic No One Talks About*, NPR (January 8, 2018), available at <https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about>.

²⁰ U.S. Department of Justice, Bureau of Justice Statistics, *American Indians and Crime: A BJS Statistical Profile, 1992-2002* at 5, Table 7 (2004), available at <https://www.bjs.gov/content/pub/pdf/aic02.pdf>.

²¹ Centers for Disease Control, National Intimate Partner and Sexual Violence Survey, *An Overview of 2010 Findings on Victimization by Sexual Orientation*, available at https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_victimization_final-a.pdf.

²² National Center for Transgender Equality, *2015 U.S. Transgender Survey* at 205 (2016), available at <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

²³ U.S. Department of Justice, Bureau of Justice Statistics, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* (2014), available at <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

THE SEXUAL ASSAULT INVESTIGATIVE AND PROSECUTORIAL PROCESS

There are a number of individuals involved in responses to reports of sexual assault, including the victim-survivors, victim advocates, law enforcement, prosecutors, and health care providers. When a sexual assault is reported to the police, the officer who initially responds typically conducts a limited interview to confirm a sex crime has occurred and gather information to potentially identify the offender. The officer generally makes an initial report. If the law enforcement agency has a dedicated sex crimes unit, an investigator from that unit generally takes over the investigation following the initial report.

The investigator is responsible for in-depth interviewing of the victim-survivor, suspect, and witnesses, conducting searches, and seizing additional evidence. Victim-survivors of sexual assault often experience high levels of stress and trauma. This trauma can make interviewing sexual assault victim-survivors more complex than interviewing victims of many other types of crimes. Accordingly, it is valuable to have sex crimes investigators who have been trained in trauma-informed interview techniques.

Victim advocates may become involved at the initiation of a case. If a victim-survivor presents an assault at a hospital, an advocate will be called. The advocate can be present when the victim-survivor meets with the investigator. The advocate's role is to provide the victim-survivor with support and notice of the victim's rights. Victim advocates are often trained in trauma-informed advocacy and can work with law enforcement to support the victim-survivor through the criminal justice process, when the victim-survivor decides to pursue their case. An advocate may meet with victim-survivors to help with their needs, explain the criminal justice system, give the victim-survivors an opportunity to ask questions, and assist in safety planning, education, and connecting the victim-survivor with resources, among other things. Sexual

assault advocates cannot disclose any opinion or information received about the victim-survivor without consent. *See* Minn. Stat. § 595.02(k).

In Minnesota, sexual assault victim advocates must meet the standards outlined in Minnesota Statutes section 595.02, subdivision 1(k), which requires that advocates receive at least 40 hours of crisis counseling training and that they work under the direction of a supervisor in a center whose primary purpose is to render advice, counseling, or assistance to victims of sexual assault. The Minnesota Office of Justice Programs sets standards for sexual assault programs that receive funding through the office.²⁴ Employment of victim advocates is often paid for through supporting grants.²⁵

At some point, either before or after filing a report, the victim-survivor may receive a forensic medical exam. In some jurisdictions, these exams are conducted by a Sexual Assault Nurse Examiner (SANE).²⁶ SANE nurses are trained to perform forensic exams, which includes documented collection of possible sources of DNA, treatment of injuries, and education regarding follow-up care and recovery. The collection of evidence during SANE exams follows a strict protocol.²⁷ SANE nurses regularly are called to testify in court as witnesses in sexual assault cases under the medical hearsay exemption.²⁸

²⁴ *See, e.g.,* Office of Justice Programs, *Sexual Assault Program Standards*, available at <https://dps.mn.gov/divisions/ojp/forms-documents/Documents/CVS/CVSSexualAssaultStandards.pdf>.

²⁵ *See, e.g.,* U.S. Department of Justice, Office of Violence Against Women, Grants and Programs, <https://www.justice.gov/ovw/awards/fy-2015-ovw-grant-awards-program>.

²⁶ Resources on Minnesota SANE programs is available from the International Association of Forensic Nurses, Minnesota Chapter, <http://mnforensicnurses.org>.

²⁷ *See* National Training Standards for Sexual Assault Medical Forensic Examiners, U.S. Department of Justice Office on Violence Against Women (2d. ed. 2018), https://cdn.ymaws.com/www.safeta.org/resource/resmgr/docs/Training_SexualAssaultForens.pdf ; *see also* International Association of Forensic Nurses, <https://www.forensicnurses.org>; Dan (Footnote Continued on Next Page)

If a law enforcement agency refers the sexual assault case to a prosecutor's office, the prosecutor will make a charging decision. The decision to charge a case and bring it to trial depends on the prosecutor's assessment of the "provability" of the case. Prosecutors must assess the quality of the evidence, the potential admissibility of evidence, and the status of the victim and any potential witnesses in making the charging decision. In sexual assault cases, prosecutors often also consider the impact a trial may have on the victim. Under the criminal justice system, the defendant is presumed innocent, and it is the prosecutor's burden to prove guilt beyond a reasonable doubt.²⁹ The jury verdict in a criminal prosecution must be unanimous.³⁰ Jurors, like many members of the public, may have misperceptions about sexual violence and how the trauma from such violence can affect victim-survivors.

For a variety of reasons, sexual assault cases are widely recognized by prosecutors as some of the most difficult to prosecute.³¹ At the same time, some sexual assault cases are not prosecuted due to a variety of reasons, which may include inadequate investigations, misunderstandings, or a lack of awareness of the role of trauma for victim-survivors. The victim's credibility is often cited as a key factor in a prosecutor's decision to charge a case.³² A

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Olson, *Nurse Helps Sexual Assault Survivors Heal, Move On*, MPR News (Mar. 18, 2015), available at <https://www.mprnews.org/story/2015/03/17/nurse-linda-walther>.

²⁸ See, e.g., *State of Minnesota v. Morales*, No. A15-0101 (Minn. Ct. App. Feb. 8, 2016) (describing a SANE nurse's testimony during a trial that resulted in a conviction for first-degree criminal sexual conduct).

²⁹ See Minn. Stat. § 611.02 ("Every defendant in a criminal action is presumed innocent until the contrary is proved and, in case of a reasonable doubt, is entitled to acquittal.").

³⁰ Minn. R. Crim. Procedure 26.

³¹ See National District Attorneys Association, *National Sexual Assault Investigation and Prosecution Best Practices Guide* at 24 (January 3, 2018), available at <http://www.ciclt.net/ul/ndaajustice/WhitepaperFinalDraft-SA.pdf>.

³² *Id.* at 12.

lack of consistency by the victim is often cited by prosecutors as an important factor in determinations about whether the victim-survivor's credibility will impact a jury deliberation.³³ Even in cases where the prosecutor believes the victim-survivor, the prosecutor may decide the case cannot be proven beyond a reasonable doubt in part because of these credibility concerns. However, research shows that the trauma experienced by victim-survivors can impact their ability to recall and relay information about the traumatic event, especially when responding to traditional interview questions.³⁴ This means Minnesota is possibly missing opportunities to charge cases because the credibility decisions are not trauma-informed.

THE ROLE OF TRAUMA

An understanding of the neurobiology of trauma is crucial to effective law enforcement and prosecutorial responses to sexual assault reports. Trauma from a sexual assault affects the victim's memory and behavior.³⁵ For example, research has shown that incomplete memories of an assault are common because the brain encodes memories differently during a traumatic event.³⁶ The victim-survivor may not be able to recall certain details for law enforcement, because the traumatized brain was focused on other details at the time of the assault. At the same time, the science shows that, even when many months or years have passed, victim-

³³ *Id.*

³⁴ *Id.*

³⁵ See White House Task Force To Protect Students From Sexual Assault, *Not Alone: The First Report Of The White House Task Force To Protect Students From Sexual Assault* at 13 (April 2014), available at <https://www.justice.gov/archives/ovw/page/file/905942/download>.

³⁶ See, e.g., Bremner, J.D., Elzinga, B., Schmahl, C., & Vermetten, E., *Structural and functional plasticity of the human brain in posttraumatic stress disorder*, PROGRESS IN BRAIN RESEARCH (2008), 167(1), 171-186; Nixon, R. D., Nishith, P., & Resick, P. A., *The Accumulative Effect of Trauma Exposure on Short-Term and Delayed Verbal Memory in a Treatment-Seeking Sample of Female Rape Victims*, JOURNAL OF TRAUMATIC STRESS, (2004), 17(1), 31-35.

survivors will be able to accurately recall central facts about the assault, because such highly-traumatic memories do not fade away.³⁷

To law enforcement investigators, a victim's trauma can present in a way that is counterintuitive and that can make traditional investigative interviewing techniques less effective.³⁸ Increasingly, criminal justice professionals are trained in how trauma affects victim-survivors and their ability to describe the traumatic events.³⁹ The use of trauma-informed, victim-centered interview techniques can ensure that victim-survivors of sexual assault are better understood and that important evidence is not missed. An understanding of trauma is also important to properly assessing credibility.⁴⁰ To convince a jury, prosecutors must often educate jurors about the neurobiology of trauma.

Trauma-informed interviewing encompasses a variety of practices. Some of the most well-known techniques are part of the Forensic Experiential Trauma Interview (FETI) developed by Russell Strand.⁴¹ Strand developed the techniques based on his experience as special agent

³⁷ See Jim Hopper, *How Reliable Are the Memories of Sexual Assault Victims?*, Scientific American: Observations (Sept. 27, 2018) ("But memories of highly stressful and traumatic experiences, at least their most central details, don't tend to fade over time."), available at <https://blogs.scientificamerican.com/observations/how-reliable-are-the-memories-of-sexual-assault-victims/>.

³⁸ See Police Executive Research Forum, *Critical Issues in Policing: Improving the Police Response to Sexual Assault* at 37 (March 2012), available at https://www.policeforum.org/assets/docs/Critical_Issues_Series/improving%20the%20police%20response%20to%20sexual%20assault%202012.pdf.

³⁹ *Id.*

⁴⁰ See National District Attorneys Association, *National Sexual Assault Investigation and Prosecution Best Practices Guide* at 12 (January 3, 2018), available at <http://www.ciclt.net/ul/ndaajustice/WhitepaperFinalDraft-SA.pdf>.

⁴¹ See Rebecca Ruiz, *Training Aims to Improve How Military Sexual Assaults Are Investigated*, NBC NEWS (Mar. 21, 2013), available at (Footnote Continued on Next Page)

with the Army's criminal investigation division and chief in the education and training division of the Army's Military Police School.⁴² FETI is based on the understanding that information from a traumatic incident is retained as sensory information in the brain.⁴³ Sensory information is what the victim-survivor felt, heard, and perceived. It is not stored in the brain as chronological facts.⁴⁴ FETI interviewing is designed to retrieve the victim-survivor's memories of the traumatic event through experiential interviewing that does not insist on a chronological telling of facts.⁴⁵ Interviewers ask about the victim-survivor's sensory impressions with open-ended, non-leading questions.⁴⁶ Such questions allow victim-survivors to relate what they can about the experience and in their own order. FETI is just one methodology that incorporates trauma-informed techniques. There are other proven trauma-informed methodologies that law enforcement agencies have adopted.

The concept of trauma-informed interviewing has gained acceptance among law enforcement. The International Association of Chiefs of Police's guidelines for investigative

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http://usnews.nbcnews.com/_news/2013/03/21/17375404-training-aims-to-improve-how-military-sexual-assaults-are-investigated. See also Russell Strand's website, <https://www.russellstrand.com/certified-feti/>.

⁴² See *id.*

⁴³ See Sara F. Dudley, *Paved with Good Intentions: Title IX Campus Sexual Assault Proceedings and the Creation of Admissible Victim Statements*, 46 GOLDEN GATE U. L. REV. 117, 145 (May 2016).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 145–46.

strategies involving sexual assault reports calls for law enforcement to recognize the impact of trauma and how it affects victim-survivor's behavior.⁴⁷

SYSTEMIC FAILURES IN RESPONSES TO SEXUAL ASSAULT REPORTS

Attorney General Swanson convened the Working Group in response to the *Star Tribune's* in-depth investigative series, "Denied Justice."⁴⁸ The first of the series was published on July 22, 2018. The series exposed significant and systemic shortcomings in the criminal justice system's responses to reports of sexual assault. As part of its investigation, the *Star Tribune* reviewed more than 1,000 sexual assault cases, from the 20 Minnesota law enforcement agencies that reported the most sexual assaults in 2015 and 2016, and had veteran investigators review over 160 of the case files.

The *Star Tribune* came to a troubling conclusion:

Each year in Minnesota, more than 2,000 women report being raped or sexually assaulted. Hundreds of them discover a crushing fact: They stand little chance of getting justice.⁴⁹

This conclusion is all the more problematic because studies have consistently shown that only a small percentage of victim-survivors ever make a report.⁵⁰

⁴⁷ International Association of Chiefs of Police, *Sexual Assault Incident Reports: Investigative Strategies* (Aug. 8, 2018), available at <https://www.theiacp.org/sites/default/files/all/s/SexualAssaultGuidelines.pdf>.

⁴⁸ The entire series is available at <http://www.startribune.com/denied-justice-series-when-rape-is-reported-and-nothing-happens-minnesota-police-sexual-assault-investigations/487400761/>.

⁴⁹ Brandon Stahl, Jennifer Bjorhus and MaryJo Webster, *Denied Justice: When Rape Is Reported And Nothing Happens*, STAR TRIBUNE (July 22, 2018).

⁵⁰ See, e.g., International Association of Chiefs of Police, *Sexual Assault Response: Policy and Training Content Guidelines* 5–6 (June 2011), available at <https://www.theiacp.org/sites/default/files/all/i-j/IACP%20Sexual%20Assault%20Response%20Policy%20and%20Training%20Content%20Guidelines.2017.3.23.pdf>.

The newspaper identified a number of troubling shortcomings related to the thoroughness of sexual assault investigations, including that law enforcement agencies:

- Failed to assign an investigator in about one quarter of all cases.
- Never interviewed the victim-survivor in one-third of the cases.
- Frequently failed to use victim-centered, trauma-informed interview techniques.
- Often failed to follow up with the victim.
- Failed to interview potential witnesses in half the cases.
- Failed to interview the named suspect in many cases.
- Often failed to collect evidence.
- Routinely failed to conduct searches of the suspect and the suspect's property.
- Often failed to document the completion of a background check on the suspect using the widely available criminal databases of the National Crime Information Center or Minnesota Bureau of Criminal Apprehension.
- Often did not arrest the suspect.⁵¹

In addition, the newspaper noted that:

- Only 26 percent of cases were forwarded to prosecutors to consider charges.
- Only 12 percent of reported cases resulted in a sexual assault charge, and seven percent of all reports resulted in a conviction.

⁵¹ Brandon Stahl, Jennifer Bjorhus and MaryJo Webster, *Denied Justice: When Rape Is Reported And Nothing Happens*, STAR TRIBUNE (July 22, 2018).

- Victim-survivors stopped cooperating with law enforcement in about one-third of the cases, which experts point out is sometimes preventable if victim-survivors are treated with respect and feel their cases are being heard.⁵²

As noted above, few victim-survivors come forward to file reports. It is important to give victim-survivors who do report confidence in the integrity of the process, so that they will continue the participation needed to bring offenders to justice. Otherwise, these offenders are free to reoffend. The *Star Tribune* series detailed numerous problems in which agencies were often not responsive to victim-survivor phone calls, failed to contact victim-survivors after promising to follow up, failed to provide victim-survivors with updates on the investigation, failed to notify victim-survivors when the investigation was terminated or prosecution declined, and sometimes seemingly blamed victim-survivors.

The newspaper also found that, when a victim-survivor is sober, prosecutors charge about 15 percent of the sexual assaults, but then when a victim-survivor is intoxicated, the prosecution rate drops to 8 percent.⁵³ The report suggested that the prosecutors' ethical duty not to bring cases where the evidence does not support a conviction sometimes results in a failure to bring seemingly meritorious cases they are not guaranteed to win.⁵⁴

⁵² *Id.*

⁵³ Brandon Stahl, Jennifer Bjorhus and MaryJo Webster, *Denied Justice: How Alcohol Foils Rape Cases*, STAR TRIBUNE (August 12, 2018).

⁵⁴ Brandon Stahl, Jennifer Bjorhus and MaryJo Webster, *Denied Justice: Rejected by the Prosecution*, STAR TRIBUNE (October 21, 2018).

SUMMARY OF STATUTES, RULES, AND POLICIES INVOLVED IN SEXUAL ASSAULT INVESTIGATIONS AND PROSECUTIONS

A. Sexual Assault Defined.

Minnesota categorizes criminal sexual conduct into five degrees, with first degree the most serious. *See* Minn. Stat. §§ 609.342–.3451. The classification of degrees is based on several factors, including whether the offense involved sexual penetration, the age of the victim-survivor, the degree of injury, and whether force or coercion was used.

Criminal sexual conduct in the first degree includes sexual penetration where the victim-survivor had a reasonable fear of imminent great bodily harm or the offender was armed with a dangerous weapon. Minn. Stat. § 609.342. Criminal sexual conduct in the second degree involves sexual contact, rather than penetration, where the victim-survivor had a reasonable fear of imminent great bodily harm or the offender was armed with a dangerous weapon. Minn. Stat. § 609.343. Criminal sexual conduct in the third degree includes sexual penetration where the offender used force or coercion to accomplish penetration, or the offender knew or had reason to know the victim-survivor was mentally impaired, mentally incapacitated, or physically helpless. Minn. Stat. § 609.344. Criminal sexual conduct in the fourth degree involves sexual contact, rather than penetration, where the offender used force or coercion to accomplish the contact, or the offender knew or had reason to know the victim-survivor was mentally impaired, mentally incapacitated, or physically helpless. Minn. Stat. § 609.345. Criminal sexual conduct in the fifth degree includes nonconsensual sexual contact, and masturbation or lewd exhibition in the presence of a minor. Minn. Stat. § 609.3451. Fifth degree offenses are typically gross misdemeanors, but they are enhanced to felonies for repeat sex offenders.

Prosecutors may seek an enhanced sentence, up to life in prison, if the sexual contact involved “heinous elements,” such as torture, great bodily harm, mutilation, extreme inhumane conditions, use of a weapon, multiple perpetrators or multiple victims, or removal of the victim from one place to another without safe release. Minn. Stat. § 609.3455.

B. Minnesota’s Crime Victim Rights Act.

Minnesota’s Crime Victim Rights Act establishes certain rights for victims, some of them specific to sexual assault victim-survivors. *See* Minn. Stat. ch. 611A.

Generally, victims in Minnesota are entitled to notification of their rights under Minnesota law, the content of any plea agreements, changes in the schedule of court proceedings, the final disposition of the case, any pending appeals by the offender, sentence modifications for the offender, and the release or transfer of the offender from prison or custody. *See* Minn. Stat. §§ 611A.02–.06.

With respect to domestic violence and sexual assault, prosecutors must make every reasonable effort to notify victim-survivors about their decisions to decline prosecution or dismiss the case. Minn. Stat. § 611A.0315. Sexual assault victim-survivors are also entitled to make a confidential request for HIV testing of a convicted offender, and they may not be required to undergo a polygraph examination for an investigation or prosecution to proceed. Minn. Stat. §§ 611A.19, .26. In addition, victim-survivors do not have to pay for their sexual assault medical examination. Minn. Stat. § 609.35. Rather, the costs of medical examinations performed for the purpose of gathering evidence are paid by the county where the criminal sexual conduct occurred. *Id.* The Office of Justice Program’s Crime Victim Justice Unit is Minnesota’s victim rights compliance office. It has authority to investigate complaints from

crime victims about decisions and actions of criminal justice professionals. *See* Minn. Stat. § 611A.74. The unit may make recommendations to the appropriate law enforcement authority.

C. Sexual Assaults and Intoxication.

Under Minnesota law, when a sexual assault occurs against a victim who is too intoxicated to “consent” to a sex act, and the assault does not involve force or coercion, prosecutors must prove the victim-survivor was “mentally impaired, mentally incapacitated, or physically helpless.” Minn. Stat. § 609.344, subd. 1(d).

“Consent,” under the criminal sexual conduct statutes, “means words or overt actions indicating a freely given present agreement to perform a particular sexual act with the actor.” Minn. Stat. § 609.341, subd. 4. “Mentally impaired” means that “a person, as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration.” *Id.* § 609.341, subd. 6. “Mentally incapacitated” means that “a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person’s agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.” *Id.* § 609.341, subd. 7. “Physically helpless” means that “a person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.” *Id.* § 609.341, subd. 9.

At least four states—Wisconsin, Arizona, Hawaii, and Kansas—prohibit sexual intercourse with a person who is too intoxicated to consent. In Wisconsin, sexual assault includes “sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has

actual knowledge that the person is incapable of giving consent and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.” Wis. Stat. § 940.225(2)(cm). Similarly, Arizona and Kansas prohibit sexual intercourse with a person who is incapable of giving consent due to drugs or alcohol, and the condition was known or reasonably should have been known to the defendant. Ariz. Rev. Stat. § 13-1401(A)(7)(B); Kan. Stat. § 21-5503(a)(2). Hawaii’s statutory language establishes that consent is not a defense to sexual assault if the person, by reason of intoxication, “is manifestly unable or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct alleged.” Haw. Rev. Stat. § 702-235.

Several other states prohibit sexual intercourse with a person who is too intoxicated to resist or too intoxicated to understand the nature of the sexual conduct. *See, e.g.*, La. Rev. Stat. 14:43(A)(1); Md. Crim. Law § 3-301(b); Wash. Stat. Rev. Code § 9A.44.010(4).

D. State Training Requirements for Sexual Assault Investigators.

Several states, including Washington, Illinois, New Jersey, and Massachusetts, require specialized training for sexual assault investigators.

In 2017, Washington enacted a law directing its criminal justice training commission to “provide ongoing specialized, intensive, and integrative training for persons responsible for investigating sexual assault cases involving adult victims.” Wash. Rev. Code § 43.101.272. The training “must be based on a victim-centered, trauma-informed approach to responding to sexual assault” and “must include content on the neurobiology of trauma and trauma-informed interviewing, counseling, and investigative techniques.” *Id.* Officers assigned to regularly investigate sexual assault cases involving adult victim-survivors must complete the training within one year of being assigned. *Id.*

In Illinois, effective January 1, 2019, the Illinois Law Enforcement Training Standards Board must “conduct or approve training programs in trauma-informed responses and investigations of sexual assault and sexual abuse.” Il. Stat. Ch. 50 § 705/10.21(a). Law enforcement agencies “employing law enforcement officers who conduct sexual assault and sexual abuse investigations must provide specialized training to these officers on sexual assault and sexual abuse investigations within 2 years after January 1, 2017 . . . and must present in-service training on sexual assault and sexual abuse investigations to these officers every 3 years.” *Id.* § 705/10.21(d).

New Jersey has required training on the handling, investigation, and response procedures for reports of sexual assault, which must be completed in-service every three years. N.J. Stat. § 52:4B-54.1. Massachusetts requires officers conducting sexual assault investigations to have completed a proscribed course of study. Mass. Gen. Laws 41 § 97B.

In Minnesota, the Board of Peace Officers Standards and Training (POST Board) sets professional standards, licenses peace officers who have met education and experience requirements, and develops continuing in-service training for peace officers. Minn. Stat. § 626.845. The legislature has directed the POST Board to prepare training courses on certain topics and has made some trainings mandatory. For example, all peace officers must receive training on crimes motivated by bias and annual instruction on the use of force and deadly force. Minn. Stat. §§ 626.8451–.8452.

Minnesota has not required training specific to sexual assault investigations. The POST Board has approved continuing education classes on sexual assault investigations. However,

according to the *Star Tribune*, in the past two years, only 29 peace officers in the entire state have taken one of the courses.⁵⁵

E. State Model Policies for Sexual Assault Investigations.

Several states have required the creation of model policies for responding to sexual assault reports, on which local law enforcement agencies can base their policies.

In Illinois, each agency is required to have a policy for responding to sexual assault reports. Il. Stat. Ch. 725 § 203/15. In Kentucky, the legislature recently created a Sexual Assault Response Team Advisory Committee, whose duties include developing “model policies for law enforcement agencies related to handling sexual assault examination kits and investigating sexual assaults with a victim-centered, evidence-based approach.” Ky. Stat. § 403.707(5)(e). In Washington, DC, legislation tasked the Office of Victim Services with retaining an expert “to ensure the [Metropolitan Police Department] has a detailed and victim-centered sexual assault response policy that comports with best practices and current professional standards and incorporates the requirements of the International Association of Chiefs of Police Model Policy on Sexual Assaults or other current best practices in law enforcement.” D.C. Code § 4-561.05.

In Minnesota, the legislature has directed the POST Board to develop model policies on certain topics and required law enforcement agencies to have a policy based on them. For example, all law enforcement agencies must have a policy for investigating missing or endangered children cases that is based on a model POST Board policy. Minn. Stat. § 626.8454.

⁵⁵ Jennifer Bjorhus, Brandon Stahl and MaryJo Webster, *Denied Justice: Police Overwhelmed and Undertrained*, STAR TRIBUNE (Sept. 30, 2018).

Minnesota does not require law enforcement agencies to have a policy on responding to sexual assault reports.

F. Ethical Obligations of Prosecutors.

In Minnesota, “every defendant in a criminal action is presumed innocent until the contrary is proved and, in case of a reasonable doubt, is entitled to acquittal.” Minn. Stat. § 611.02. It is the prosecutor’s burden to prove guilt beyond a reasonable doubt to a unanimous jury. “A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.” Minn. Crim. Jury Instr. 3.03.

The ethical standards applicable to prosecutors provide that a “prosecutor should not seek an indictment unless the prosecutor reasonably believes the charges are supported by probable cause and that there will be admissible evidence sufficient to support the charges beyond reasonable doubt at trial.” ABA Prosecution Function Standard 3-4.6(a). A prosecutor should only proceed to trial “if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.” *Id.* 3-4.3(b). At the same time, prosecutors also have a responsibility to be truthful with victims when discussing likely trial outcomes and the pressure of testifying at trial.

Prosecutors often point to these ethical standards to explain their decisions not to prosecute a sexual assault case.⁵⁶ The *Star Tribune* spoke to a former prosecutor and expert on sexual violence cases, though, who explained: “Prosecutors need to expand their view of what

⁵⁶ Brandon Stahl, Jennifer Bjorhus and MaryJo Webster, *Denied Justice: Rejected by the Prosecution*, STAR TRIBUNE (October 21, 2018).

‘evidence sufficient to support a conviction’ means. It can be the testimony of the victim, if it’s compelling enough.”⁵⁷

The ethical standards for prosecutors do not advise against bringing cases simply because they are not guaranteed to result in a conviction. “Reasonable doubt” does not mean “beyond all possibility of doubt.” Minn. Crim. Jury Instr. 3.03. Moreover, the ethical standards expressly state that a “prosecutor may file and maintain charges even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.” ABA Prosecution Function Standard 3-4.4.4(c). Thus, a fear of losing at trial should not, by itself, justify a decision to decline prosecution when the prosecutors believe, based on their experience and expertise, there is sufficient admissible evidence to support a conviction at trial.

RECOMMENDATIONS

The problems that can plague sexual assault investigations involve complex societal factors that cannot be entirely reformed in one legislative session. Having said that, steps can be taken to improve outcomes and the experiences of victim-survivors across Minnesota.

Not every possible reform will be right for every law enforcement agency. The large metro area counties have dedicated sex crimes divisions that handle a high volume of cases each year. The caseload for these investigators can be enormous. Unfortunately, in some agencies, sex crime investigations are considered an undesirable assignment, and some investigators may not be as committed to the work and to pursuing justice on behalf of victim-survivors as they should be. By contrast, some rural agencies handle very few sex crime cases. For these agencies, deficiencies are more likely to involve a lack of experience and training for

⁵⁷ *Id.*

investigating sexual assault cases. The Working Group's recommendations can be applied, or tailored, to law enforcement agencies across the state, regardless of their size and whether they are urban, suburban, or rural agencies.

The Working Group has strived to craft recommendations that can be implemented this legislative session and in the coming months. The Working Group did not address funding priorities among competing recommendations, and understands that additional dialogue will be needed to determine how best to implement some of the recommendations.

Based on the members' collective expertise in the fields of victim advocacy, law enforcement, prosecutions, and health care, the Working Group makes the following recommendations:

Recommendations for the Minnesota Legislature

Recommendation #1: The Legislature Should Require Agencies To Adopt Sexual Assault Policies and Protocols.

The Legislature should require law enforcement agencies in Minnesota to have a written policy and protocols for responding to and investigating reports of sexual assault. The policy and protocols should be evidence-based, trauma-informed, and victim-centered.

The Working Group understands that the POST Board is in the process of developing a model policy that will be available to law enforcement agencies. Law enforcement agencies may choose to base their policies on the POST Board's model policy. Alternatively, an agency may choose to rely on another model policy that comports with best practices and current professional standards, such as the International Association of Chiefs of Police Model Policy on Sexual Assaults.

Not only can a policy provide useful guidance to law enforcement, it can improve accountability. A police chief can point to a policy based on best practices to hold subordinate officers accountable, and city councils can do the same to hold police chiefs accountable when an agency exhibits repeated deficiencies in its responses to sexual assault reports.

Recommendation #2: The Legislature Should Require the BCA To Offer Training for Local Law Enforcement Agencies in Trauma-Informed Investigations and Should Appropriate Funds to the BCA for this Purpose.

The Minnesota Bureau of Criminal Apprehension (BCA) offers training on specialized investigative techniques to law enforcement.⁵⁸ Several states require similar government agencies to offer training on trauma-informed sexual assault investigations. For example, in 2017, Washington enacted a law directing its criminal justice training commission to “provide ongoing specialized, intensive, and integrative training for persons responsible for investigating sexual assault cases involving adult victims.” Wash. Rev. Code § 43.101.272. For Washington state, the training must be based on victim-centered, trauma-informed approaches. The Minnesota Legislature should similarly require the BCA to facilitate training for law enforcement in investigating sexual assault cases and should appropriate funds to the BCA for this purpose. Among other things, the training should include trauma-informed interviewing techniques and should also address investigations where the victim-survivor is intellectually disabled. This requirement should have a phase-in period to allow the BCA time to develop and implement the training. The BCA should consult with the POST Board and, if necessary, outside

⁵⁸ See Minnesota Bureau of Criminal Apprehension, BCA Training and Auditing, <https://dps.mn.gov/divisions/bca/bca-divisions/administrative/Pages/criminal-justice-training-and-education.aspx>.

experts to determine the best strategy, delivery, and curriculum for state-wide training efforts, including trauma-informed approaches.

The POST Board should require such training for law enforcement officers who regularly investigate sexual assault cases. If the POST Board believes that legislative authorization is needed to do this, such authorization should be granted by the Legislature.

Recommendation #3: The Legislature Should Improve the Ease of Reporting Sexual Assaults.

Minnesota law currently allows identity theft victims to make a report to a law enforcement agency outside the jurisdiction where the crime was committed. *See* Minn. Stat. § 609.527, subd. 5. That agency is required to prepare a report and, if an investigation determines the crime was committed in a different jurisdiction, refer the matter to the proper law enforcement agency for an investigation of the facts. Just as it did with identity theft, the Legislature should require that agencies accept reports of sexual assault regardless of the jurisdiction and, if the agency does not have jurisdiction to investigate the matter, to require it to refer the matter to the agency that does have such jurisdiction.

Law enforcement agencies should complete a written police report upon receiving an allegation that a person has been sexually assaulted, regardless of the jurisdiction where the alleged assault occurred. This practice can ensure that victim-survivors receive validation and are not turned away by law enforcement the first time they come forward to report a sexual assault, which may affect their continuing cooperation.

There are many reasons why a law enforcement agency may receive a report of an assault that did not happen in its jurisdiction. The fact that an assault occurred outside the jurisdiction should not prevent an agency from taking a report and sending it to the proper agency, if it

determines the assault took place in another jurisdiction. The agency with jurisdiction should confirm receipt to the agency that took the report to ensure that such reports are not overlooked. Illinois similarly requires that a law enforcement officer complete a written police report upon receiving an allegation of sexual assault, regardless of where the incident occurred. Il. Stat. Ch. 725 § 203/20.

Recommendation #4: The Legislature Should Require Law Enforcement Agencies To Report Aggregate Data on Sexual Assault Reports and Responses.

The Minnesota Legislature requires postsecondary institutions to annually report statistics on sexual assault to the Office of Higher Education, which then publishes the data on its website. Minn. Stat. § 135A.15, subd. 6. The schools are required to report on the annual number of sexual assault cases that were reported to the institution, the number investigated, the number referred to disciplinary proceedings, and the number that resulted in a finding of responsibility for a perpetrator, among other data. *Id.*

The Legislature should similarly require Minnesota's law enforcement agencies to collect data on sexual assaults and report it annually to the Minnesota Department of Public Safety, for publication. Such annual law enforcement reports should include data on the number of sexual assault cases that were reported to the agency, assigned to an investigator, sent to a prosecutor, charged, dismissed, and that resulted in a conviction. The reports should also include data on the number of investigations conducted by investigators who had completed training on trauma-informed, victim-centered techniques in the past three years. For privacy reasons, no data should be reported that contains identifying information about the victim-survivor or suspect.

These statistics will enable the public and policymakers to help ensure that sexual assault reports are properly investigated. Other states have similar reporting requirements. For

example, Arizona requires its criminal justice commission to annually compile and report data on the number of sexual assault reports filed in the state, the number of charges filed and convictions obtained, and the sentences imposed. Ariz. Stat. § 41-2406.

Recommendation #5: The Legislature Should Amend the Victim’s Rights Statute and Expand Access to Victim Advocates.

Minnesota Statutes section 611A.02 currently requires law enforcement officers to distribute a notice of victims’ rights, including information on the nearest crime victim assistance program or resource, at the time of initial contact with the victim. The Legislature should consider expanding this statute to establish that sexual assault victim-survivors who make a report to law enforcement are legally entitled to have access to an advocate, if they choose, and that law enforcement will contact an advocate at their request. As discussed above, victim advocates are often trained in trauma-informed advocacy and play an important role in supporting the victim-survivor through the criminal justice process.

The effectiveness of such a requirement may depend on the number of qualified victim advocates in Minnesota. In Washington, D.C., the district formed a statutory task force to determine whether it needed more sexual assault victim advocates and to “[c]reate a plan for how the District . . . can provide additional sexual assault victim advocates to meet the needs identified.” D.C. Code § 4-561.15. The Minnesota Legislature, or another government body, may need to develop a similar plan to ensure that victim-survivors who want it have access to a victim advocate.

Recommendation #6: The Legislature Should Consider Granting Advocates Access to the Contact Information for Victim-Survivors Who Make Police Reports.

The Legislature should consider amending Minnesota law to allow victim advocates to access the basic contact information for victim-survivors who make police reports. This would

enable advocates to offer their services to people who have already chosen to engage with the criminal justice system through a police report. Advocates could explain their role and directly offer their services, which the victim-survivor may decline. This practice would align with the current practice in medical settings, where an advocate is called whenever a victim-survivor seeks a forensic medical exam.

Recommendation #7: The Legislature Should Clarify the Definition of “Physically Helpless,” for Purposes of Bringing Prosecutions When a Victim-Survivor Is Intoxicated.

Under current Minnesota statutes, when a sexual assault occurs against a victim who is too intoxicated to consent to a sex act, and the assault does not involve force or coercion, prosecutors must prove the victim was “physically helpless.” Minn. Stat. § 609.341. Section 609.341 defines “physically helpless” as “(a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.” This definition of “physically helpless” effectively precludes prosecution in some cases in which a victim is awake, but too intoxicated to consent to sex.

As discussed above, several states prohibit sexual intercourse with a person who is too intoxicated or otherwise chemically impaired to grant consent. The Legislature should change the law to have Minnesota join other states that prohibit sexual contact with a person who is unable to consent due to an intoxicating substance.

Recommendation #8: The Legislature Should Reenact Authorization for Pre-Conviction DNA Collection.

DNA profiling is one of the most valuable crime-solving tools available to law enforcement, especially in sexual assault cases. Suspects are routinely identified when DNA

collected from a victim-survivor matches a DNA profile in state or national databases of known offenders.

The Minnesota Legislature enacted section 299C.105 of the Minnesota Statutes in 2005. The statute requires sheriffs and peace officers to collect DNA samples from persons who have appeared in court and have had a judicial probable cause determination on a charge of committing one or more of ten serious criminal offenses. Another law, Minnesota Statutes section 609.117, requires DNA samples to be taken from all persons who are *convicted* of committing or attempting to commit any felony offense and from all juveniles who are adjudicated delinquent for committing or attempting to commit any felony offense.

In 2006, the Minnesota Court of Appeals held that the collection of DNA samples under section 299C.105 from persons *arrested* for but not yet *convicted* of a serious criminal offense “violate[d] the Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution.” *In re C.T.L.*, 722 N.W.2d 484, 492 (Minn. Ct. App. 2006). Following *C.T.L.*, county sheriffs and peace officers in Minnesota stopped collecting DNA samples under section 299C.105 from persons *arrested* for serious crimes. They continued to collect DNA samples under section 609.117 from persons *convicted* of felonies.

In 2013, the United States Supreme Court held that the collection of DNA samples from a person *arrested* with probable cause but not yet *convicted* of a serious offense did not violate the Fourth Amendment to the U.S. Constitution. *Maryland v. King*, 569 U.S. 435, 133 S. Ct. 1958 (2013). The Maryland statute at issue in *King* is nearly identical to section 299C.105. The Minnesota Attorney General’s Office and at least one Minnesota county attorney have concluded that *King* effectively overturned the Minnesota Court of Appeals ruling in *C.T.L.* and revived section 299C.105, but the issue has not been litigated before Minnesota courts.

Currently, no Minnesota county is collecting DNA samples from arrestees following the U.S. Supreme Court decision in *King*, apparently for fear of financial liability should there be a civil lawsuit and an adverse ruling. Minnesota peace officers continue to collect DNA samples from *convicted* felons under section 609.117, but not from arrestees under section 299C.105. This limitation reduces the pool of DNA profiles for comparison to samples from crime scenes, and thus reduces the likelihood of a match in cases of unidentified assailants.

The Legislature should consider reenacting section 299C.105, at least as it relates to persons arrested for sex offenses, and appropriating funds to the Legislative Coordinating Commission to be used to cover litigation costs incurred by a county for defending the constitutionality of the law.

Recommendation #9: The Legislature Should Repeal the Voluntary Relationships Statute.

Minnesota Statutes section 609.349, commonly referred to as the “marital exception,” precludes prosecution for certain sexual assaults among cohabitating couples. The statute precludes prosecution for a sexual assault when the victim-survivor was physically helpless and either was married and living together with the perpetrator, or was not married but was living together in an ongoing voluntary sexual relationship. The Legislature should eliminate this exception for these types of cases.

Recommendation #10: The Legislature Should Consider Establishing a Statewide Council To Analyze Responses to Sex Crimes and Coordinate Regional Investigative Resources.

The Legislature should establish a statewide council to conduct comprehensive research and assess responses to sexual assaults on a systems level. The council should consist of multi-disciplinary members and collaborate with state government agencies, such as the Minnesota

Department of Public Safety, to coordinate data management of these complex issues and track data trends over time to better identify systemic problems.

For smaller law enforcement agencies that receive few sexual assault reports, developing and maintaining expertise can be difficult. For example, a small rural police department may find it challenging to invest in advanced training for sexual assault investigations if the agency only gets a couple of reports each year. In such cases, departments could benefit from regional investigative resources and training and assistance in sexual assault cases.

The Legislature has done this in other areas. Minnesota Statutes section 299A.642 establishes a statewide Violent Crime Coordinating Council to develop an overall strategy to ameliorate the harm caused to the public by gang and drug crime. The law establishes multijurisdictional task forces to investigate gang and drug crime and authorizes grants to fund them. Each task force has a locally appointed governing board, which consists of a prosecutor and officer from each participating agency. The statewide council is responsible for developing procedures and policies for use by the task forces in their investigations. A statewide coordinator is appointed to coordinate and monitor enforcement activities, ensure statewide coordination, facilitate training, and monitor compliance with investigative protocols. There are currently 21 multijurisdictional task forces funded under this law. About three quarters of the counties in Minnesota are covered by one of the task forces, and they are able to draw from the expertise and resources of the task force when faced with a complicated gang or drug crime.

The Legislature should consider a similar model of enhanced resources for the investigation of sexual assaults, with multijurisdictional sexual assault task forces.

Another regional solution could involve the use of the Minnesota Bureau of Criminal Apprehension (with additional funding) to provide more investigative assistance for law

enforcement agencies that do not have a dedicated sex crimes unit. Through its 11 statewide field offices, the BCA provides assistance to criminal justice agencies statewide for a number of specialized investigative services, such as missing person cases. The Legislature could allocate to the BCA the funds needed to employ more dedicated officers with sex crimes experience and training in trauma-informed, victim-centered best practices. Local agencies that lack similarly trained officers, and that receive few sexual assault cases, could then look to the BCA for greater assistance when they do receive a sexual assault report.

Recommendation #11: The Legislature Should Allocate Funds for Innovation Grants.

Best practices for responses to sexual assaults are evolving. To become a national leader, Minnesota will have to continue to study the problem and explore further solutions. To that end, the Legislature should allocate funds for “innovation” or pilot grants for agencies to pilot new processes or process improvements in their responses to sexual assault reports. The grants could be administered by the Minnesota Department of Public Safety. The grants would require the agencies to develop new processes and to track outcomes under the piloted system. Agencies could develop these processes with the help of outside experts or in consultation with county attorneys, health professionals, and victim advocates.

Recommendations for Law Enforcement Agencies

Recommendation #1: Each Law Enforcement Agency Should Adopt a Sexual Assault Policy.

Every law enforcement agency should adopt written policies and procedures for investigating alleged incidents of sexual assault. The policies should provide step-by-step guidelines for all aspects of an investigation, from the initial call to the follow-up investigation. The policy should make clear that the agency will respond to and accept all sexual assault

reports. The policy should require agencies to be respectful and provide dignity to victim-survivors and be informed about and trained in ways to respond to the trauma experienced by victim-survivors. The policy should describe the victim-survivor and suspect interview process, collection of evidence, and documentation requirements.

The policy should include, but not necessarily be limited to, the responding officer's duties; the duties of officers investigating sexual assaults and sexual abuse; the supervisor's duties; report writing; reporting methods; victim-survivor interviews; evidence collection; suspect background checks; sexual assault medical forensic examinations; suspect interviews; suspect forensic exams; witness interviews; sexual assault response teams, if applicable; working with victim advocates; working with prosecutors; victim-survivors' rights; and victim-survivor notification. Among other things, the policy should, at a minimum, ensure that the law enforcement agency:

- Promptly opens a file upon the receipt of an allegation of sexual assault and assigns the file to an officer for investigation;
- Promptly contacts and interviews the victim, which should ordinarily occur in person;
- Promptly connects with victim advocates;
- Refers the victim-survivor for a forensic medical exam, if the report is made within the time limitations in place for such exams at the relevant local health care facility;
- Identifies and interviews relevant witnesses;
- Interviews the alleged suspect, which should ordinarily occur in person;
- Performs a criminal background check on alleged or potential suspects to determine if they have a history of sexual assaults or other related offenses;

- Secures relevant evidence, such as body fluids, evidence of physical altercations or struggles, audio or video recordings, social media postings or electronic messages, etc., in a timely fashion;
- Forwards appropriate files to prosecutors for an assessment of potential charges;
- Consults with prosecutors on evidence that may enable a prosecution to move forward;
- Provides victim-survivors access to their police reports;
- Maintains regular contact with the victim-survivor regarding the progress of the investigation. This is important, because if victim-survivors believe that it is futile or demeaning to file a report, they will be less likely to do so, which means perpetrators can go without accountability and may reoffend.

The policy should also include interview and intake procedures for sexual assaults against people with intellectual disabilities, a population that is especially vulnerable to sexual assaults.⁵⁹ It is often assumed that these victim-survivors cannot be interviewed; however, even people with severe intellectual disabilities can usually communicate their experiences in some way.

Recommendation #2: Agencies Should Provide Adequate Training to Officers Who Investigate Sexual Assaults.

Modern research substantiates that the most effective sexual assault investigations use a victim-centered, trauma-informed law enforcement approach. Adequate training is essential to ensuring an effective law enforcement response to sexual assaults

Agencies should ensure that sexual assault investigators receive training in victim-centered, trauma-informed responses to sexual assault reports. The training should include, at a

⁵⁹ See Joseph Shapiro, *The Sexual Assault Epidemic No One Talks About*, NPR (January 8, 2018), available at <https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about>.

minimum, the following: recognizing the symptoms of trauma; asking sensory-based questions; understanding the role trauma has played in a victim's life; responding to the needs and concerns of victim-survivors; delivering services in a compassionate, sensitive, and nonjudgmental manner; understanding cultural perceptions and common myths of sexual assault; investigation of cases where the victim-survivor is intellectually disabled; report writing techniques specific to sexual assault; and basic interviewing practices to enable investigators to effectively complete the steps discussed in Recommendation #1 to law enforcement. The Working Group recognizes that agencies must operate within limited budgets. Accordingly, as noted in Recommendation #2 to the Legislature, the Working Group recommends that the Minnesota Legislature appropriate funds in the next biennium to assist agencies with such training.

Recommendation # 3: Agencies Should Receive Reports of Sexual Assaults, Regardless of Jurisdiction.

There are many reasons why a law enforcement agency may receive a report of an assault that did not happen in its jurisdiction. For example, a college student back home from campus may report an assault that occurred on campus. In some circumstances, a victim-survivor might not know the exact location of the assault, or might not know which agency has jurisdiction in the location. The fact that the assault occurred outside the jurisdiction of the agency that receives the initial report should not prevent a meaningful investigation. Agencies should accept a reported allegation that a person has been sexually assaulted and complete a written police report upon receiving such an allegation, regardless of the jurisdiction where the assault occurred. The agency should then submit the report to the agency with appropriate jurisdiction to investigate the allegations.

Recommendation #4: Agency Leadership Should Foster a Culture that Values Sex Crimes Assignments and Supports Sex Crimes Investigations.

Fixing the systemic problems involving sexual assault investigations requires more than just concrete steps. It also involves a change in culture and attitude, including changes in cultural misperceptions about sexual assault victims.

Having model policies based on best practices should make it easier for leadership to identify where officers can improve. It is up to leadership, however, to place a high value on the completion of professional sex crimes investigations that are consistent with best practices. Agency leaders should instill a sense among officers that sex crimes is an important, valued assignment. One retired Minneapolis police lieutenant told the *Star Tribune* “that running the sex crimes unit was considered a dead-end assignment for command staff in Minneapolis.”⁶⁰ Leadership of law enforcement agencies should inculcate a culture in which sex crimes assignments are not seen this way. Victim-survivors should not have to accept working with an investigator who does not want to be in the unit and does not value the work that the unit does, or an investigator who has no understanding of the impact of trauma.

In addition, law enforcement sometimes fails to conduct complete investigations because they believe prosecution of the sexual assault is unlikely. It is the role of law enforcement to determine whether there was probable cause. It is the role of prosecutors to determine whether they can prove the case beyond a reasonable doubt. When law enforcement bases their investigatory decisions on the provability of the case, they risk reducing any chance of prosecution.

⁶⁰ Jennifer Bjorhus, Brandon Stahl and MaryJo Webster, *Denied Justice: Police Overwhelmed and Undertrained*, STAR TRIBUNE (Sept. 30, 2018).

Investigators in some law enforcement agencies also report heavy caseloads, which impede their ability to thoroughly investigate every sexual assault allegation. The Working Group recognizes that all agencies are limited in the allocation of resources by a budget. Having said that, the Working Group encourages agency leadership, as well the governments responsible for funding them (counties, municipalities, etc.), to allocate sufficient resources so that caseloads for sexual assault investigators are reasonable and allow for thorough investigations. Agencies may want to adopt a best practices standard for caseloads.

Recommendation #5: Communities Can Strengthen Their Responses to Sexual Assaults by Using Multi-Disciplinary Teams.

Communities can improve and strengthen their responses to sexual assaults by establishing a multidisciplinary team, sometimes known as a Sexual Assault Response Team (SART) or a Sexual Assault Multidisciplinary Action Response Team (SMART). These teams typically include victim advocates, law enforcement officers, forensic medical examiners, and prosecutors. Members meet regularly to develop protocols, revise policies, and institute practices designed to make the criminal justice system more accessible and responsive to sexual assault victim-survivors. A major goal is to increase the trust of victim-survivors, which can reduce the number of victim-survivors who decide not to report offenses or who cease participation with law enforcement after an initial report.

Many counties in Minnesota already use these types of multi-disciplinary teams. Jurisdictions that do not should consider using them. Local law enforcement and prosecutors should participate in such teams, where they are available.

Recommendation #6: Agencies Should Consider Improving and Building upon Their Handling of Sexual Assault Investigations by Drawing Guidance from Outside Review Organizations.

The Police Executive Research Forum (PERF), a national police research and policy organization, has found:

[W]orking with an advocate or audit component to routinely review sexual assault cases helps to ensure that investigations will consistently be conducted in a professional manner. External audits also provide agency accountability.⁶¹

PERF has further found that such audits have resulted in “improvements to report documentation, proper case closure classification, and overall investigative thoroughness.”

In accordance with these findings, law enforcement agencies should consider establishing a process for an outside entity to periodically review a random sample of closed or cleared sexual assault cases. The external review should assess, at a minimum, whether: (1) all relevant witnesses and suspects were interviewed; (2) all relevant evidence was collected; (3) all indicated forensic testing was requested and results returned; (4) victim-survivor interviews were conducted in accordance with victim-centered, trauma-informed techniques; and (5) the ultimate determination as to whether a crime was committed, or whether to refer the case for prosecution, was consistent with the evidence.

An external review process need not cost an agency significant resources; for example, for agencies that lack financial resources, the multi-disciplinary teams described above could facilitate such external reviews. Another potential resource is the Sexual Violence Justice

⁶¹ See Police Executive Research Forum, *Sexual Assault Investigation Review and Assessment of the Cleveland Division of Police* (September 2013), available at <https://enforcerafelaws.org/wp-content/uploads/2015/07/cleveland-perf-report-on-sexual-assault.pdf>.

Institute at Minnesota Coalition Against Sexual Assault, which is a nationally-recognized technical assistance provider with deep knowledge of sexual assault.

Recommendation #7: Agencies Should Not Bring Charges for Underage Consumption, or Other Minor Offenses, Against Reporters of Sexual Assault.

Alcohol is involved in a large percentage of sexual assault cases. When the victim-survivor is underage and has been drinking, they may be especially hesitant to report an assault due to concerns about their own criminal liability. This fear is not irrational. The *Star Tribune* described a troubling incident where a 19-year-old woman reported to the county sheriff's office that she was sexually assaulted and, after the woman admitted that she had been drinking, the agency cited her for underage consumption.⁶² Sexual assault is one of the most underreported violent crimes. Victim-survivors face enormous barriers to making sexual assault reports. Punishing victim-survivors for such low-level offenses needlessly exacerbates the problem.

Law enforcement agencies should develop policies that reassure victim-survivors that they will not be charged or ticketed for underage consumption or other minor offenses when they report being the victim of sexual assault. This recommendation is similar in principle to the medical amnesty law in Minnesota, which protects underage drinkers from prosecution if they call authorities or 911 for medical assistance and cooperate with authorities at the scene. *See* Minn. Stat. § 340A.503, subd. 8.

⁶² Brandon Stahl, Jennifer Bjorhus and MaryJo Webster, *Denied Justice: How Alcohol Foils Rape Cases*, STAR TRIBUNE (August 12, 2018).

Recommendations for County Attorneys

Recommendation #1: Prosecutors Should Expand Their Review of Law Enforcement Investigations and Involvement with Investigators.

The *Star Tribune*'s "Denied Justice" series reported that, of over 1,000 cases reviewed, only 26 percent were forwarded to prosecutors.⁶³ In response, at least one metro area county attorney pledged to review cases never referred to prosecutors, and to assign a prosecutor to work directly on cases with police.⁶⁴

County attorneys should make prosecutors more available to law enforcement during the investigative stage, and local law enforcement should seek the insight of prosecutors, especially on difficult cases. A prosecutor's involvement in a law enforcement investigation can be valuable in a number of ways. Prosecutors are familiar with issues likely to arise in court and can sometimes suggest additional investigative steps that might turn an unchargeable case into a chargeable one. As the National District Attorneys Association (NDAA) has concluded: "Active involvement of prosecutors in assuring that law enforcement conducts complete and thorough investigations prior to the charging decision is a critical tool in ensuring that subsequent prosecutions are successful, and also ensures that charges are not brought in cases which later become impossible to prosecute due to developments in the follow-up investigation—an outcome which is devastating for victims and poses due process concerns for suspects."⁶⁵ The NDAA recommends that prosecutors reach out to local law enforcement and encourage sexual

⁶³ Brandon Stahl, Jennifer Bjorhus and MaryJo Webster, *Denied Justice: When Rape Is Reported And Nothing Happens*, STAR TRIBUNE (July 22, 2018).

⁶⁴ Jennifer Bjorhus, Brandon Stahl and MaryJo Webster, *Denied Justice: Police Overwhelmed and Undertrained*, STAR TRIBUNE (Sept. 30, 2018).

⁶⁵ National District Attorneys Association, *National Sexual Assault Investigation and Prosecution Best Practices Guide* at 8 (January 3, 2018), available at <http://www.ciclt.net/ul/ndaajustice/WhitepaperFinalDraft-SA.pdf>.

assault investigators to contact them early in the investigation, so they have an established line of communication at the front end to discuss what evidence or information might be needed for a successful prosecution. In addition, after the investigation is first completed, if a case is promising but the prosecutor feels there is not yet sufficient evidence to prove a crime beyond a reasonable doubt, prosecutors should work with law enforcement to further develop the case. If ultimately the prosecutor determines there is insufficient evidence to file charges, the prosecutor should be willing to meet with the victim or otherwise answer any questions the victim may have.

Recommendation #2: Prosecutors Should Receive Training in Victim-Survivor Trauma and Participate in Law Enforcement Training.

The National District Attorneys Association recommends that all agencies involved in sexual cases receive training in proper trauma-informed responses.⁶⁶ The association cautions that a “prosecutor’s word choice, question posed, or perceived body language can cause a victim to feel threatened, not believed or worse yet, question why they chose to report the incident to begin with.”⁶⁷ To avoid such outcomes, attorneys who prosecute sexual assault cases should receive training on the neurobiology of trauma and trauma-informed interviewing, along with their law enforcement counterparts.

The Minnesota County Attorney’s Association has a robust training program for prosecutors, and many currently participate in training for law enforcement investigation of sex crimes. County attorneys should consider expanding their participation in law enforcement training regarding the investigation of sex crimes, including training regarding how trauma

⁶⁶ *Id.* at 7.

⁶⁷ *Id.*

affects victim-survivors. The Legislature should appropriate funds to the Minnesota County Attorney's Association for such enhanced training.

Recommendation #3: Prosecutors Should Consider Prosecuting More Difficult Sexual Assault Cases Even When Evidence To Prove a Conviction Beyond a Reasonable Doubt Is Less Than Certain.

The ethical standards applicable to prosecutors provide that a prosecutor should only proceed to trial “if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.” ABA Prosecution Function Standard 3-4.3(b). But this does not mean prosecutors must feel that a conviction is certain. The ethical standards provide latitude and do not require forgoing a prosecution simply because a conviction is not a sure thing. To the contrary, the ethical standards expressly state that a “prosecutor may file and maintain charges even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.” ABA Prosecution Function Standard 3-4.4.4(c). The role of the prosecutor is that of a “minister of justice” towards the entire criminal justice system. Minn. R. Prof. Conduct 3.8, cmt. 1.

Recommendation #4: Prosecutors Should Seek Upward Departures of Sentences in Cases Involving Sexual Assaults Against People with Disabilities.

People with disabilities are sexually assaulted at a rate several times higher than those without disabilities.⁶⁸ Offenders often target them because they believe they are easier to offend against. The Minnesota Sentencing Guidelines allow a prosecutor to seek an enhanced sentence based on the aggravating factor that the victim was particularly vulnerable due to reduced mental

⁶⁸ U.S. Department of Justice, Bureau of Justice Statistics, *Crime Against Persons with Disabilities, 2009-2015* (2017), available at <https://www.bjs.gov/content/pub/pdf/capd0915st.pdf>.

capacity. Minn. Sent. Guidelines II.D.3.b(1). To further deter assaults against this especially vulnerable population, prosecutors should seek enhanced sentences in these cases. In 2016, only three offenders in the state were sentenced for criminal sexual conduct offenses with enhanced sentences due to the victim's vulnerability, according to data from the Minnesota Sentencing Guidelines Commission.⁶⁹

Recommendation #5: Prosecutors Should Consider Seeking Life Sentences in Cases Involving Especially Heinous Sexual Assaults.

In cases of first and second degree criminal sexual conduct, the court generally must sentence the offender to a life sentence if the factfinder finds a "heinous element," which includes, among other things, torture, great bodily harm, mutilation, or extreme inhumane conditions. Minn. Stat. § 609.3455. Only 22 offenders have received life sentences under the statute in the period from 2006 to 2016.⁷⁰ To further deter such extremely heinous assaults, prosecutors should consider seeking life sentences where the evidence supports a finding of the requisite heinous elements.

Recommendations for Peace Officer Standards and Training Board

Recommendation #1: The POST Board Should Adopt a Model Sexual Assault Investigation Policy.

The Minnesota Board of Peace Officer Standards and Training (POST Board) should develop a model policy on sexual assault investigations to aid Minnesota law enforcement agencies in adopting their own policies. Some states, such as Illinois, require such model policies at the state level. The Working Group understands that the POST Board is in the

⁶⁹ Minnesota Sentencing Guidelines Commission, *Sentencing Practices: Criminal Sexual Conduct Offenses Sentenced in 2016* at 24 (January 2018), available at http://mn.gov/msgc-stat/documents/reports/2016/2016_MSGC_Criminal_Sexual_Conduct_Report.pdf.

⁷⁰ See *id.* at 13–14.

process of developing a model policy that will be available to law enforcement agencies. The POST Board's model policy should be specifically detailed to provide meaningful guidance to law enforcement agencies (*i.e.*, not just aspirations or platitudes) and should contain, at a minimum, the elements outlined in Recommendation #1 for law enforcement agencies.

Recommendation #2: The POST Board Should Require Training in Victim-Centered, Trauma-Informed Responses to Sexual Assault Reports.

The POST Board should require that officers who regularly participate in sexual assault investigations receive training in victim-centered, trauma-informed responses to sexual assault reports. Several states require that sexual assault investigators receive such training, as discussed above. For example, in Washington State, training is required for “[o]fficers assigned to regularly investigate sexual assault involving adult victims . . . within one year of being assigned.” Wash. Rev. Code § 43.101.272. The required training should, at a minimum, include the topics set forth in Recommendation #2 for law enforcement agencies. As stated above, to the extent the POST Board believes that it needs authorizing legislation to require such training, the Legislature should provide such authorization to the POST Board.

In addition, the POST Board should ensure that pre-licensed officers at academies receive basic skills training in trauma-informed sexual assault investigations. Pre-licensing training need not be as substantial as the training for officers who regularly investigate sexual assaults, but it should expose them to basic concepts on which they can build through later experience and training.

CONCLUSION

One of the highest responsibilities of government is to keep the public safe. Minnesota should strive to be a national leader in the manner in which its criminal justice system responds to sexual assaults. Long-term solutions that enhance Minnesota's national standing will require sustained and collaborative efforts by stakeholders, policymakers, law enforcement, prosecutors, health professionals, and experts throughout the state. It is the hope of the Working Group that the recommendations in this Report can start to move Minnesota in the right direction.